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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 337

NABOB OIL COMPANY, A CORPORATION, AND O. O. OWENS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 273-277) is reported at 190 F. 2d 478.

JURISDICTION

The judgments of the Court of Appeals were entered on July 10, 1951 (R. 277-278), and a petition for rehearing was denied on August 24, 1951 (R. 279). The petition for a writ of certiorari was filed on September 19, 1951. The jurisdiction of this

Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTION PRESENTED

Whether, in a trial for violations of the Fair Labor Standards Act of 1938, the trial court adequately instructed the jury on wilfulness when it charged, *inter alia,* that "a defendant who actually does violate the provisions of the Fair Labor Standards Act would not be guilty of a criminal offense unless he is either conscious of the fact that what he is doing constitutes a violation of the Act or unless he wholly disregards the law and pursues a course without making any reasonable effort to determine whether the plan he is following would constitute a violation of the law or not."

STATUTE INVOLVED

The Fair Labor Standards Act of 1938, Sec. 16(a), 52 Stat. 1060, 1069, 29 U. S. C. 216(a):

> Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

STATEMENT

Petitioners were convicted on 15 counts of an indictment charging them with unlawful and wil-

ful violations, in 1948, of the Fair Labor Standards Act of 1938.[1] Counts 1 to 8 each charged employment of a designated worker in production of oil for commerce for a work week longer than 40 hours without payment for overtime at one and one-half times the regular rate (R. 6-8). Count 11 charged failure to make and preserve adequate records showing the hours worked (R. 9). Counts 12 to 17 each charged an instance of shipment of oil in interstate commerce, in the production of which oil certain employees were not paid overtime at one and one-half times the regular rates for work weeks of over 40 hours (R. 9-13).

Fines in the aggregate sum of $1,000 were imposed upon each of petitioners (R. 21-23) and the judgments were unanimously affirmed by the Court of Appeals (R. 277-278, 279-280). The petition for a writ of certiorari is based upon the contention that the instructions by the trial judge constituted reversible error.

At the trial the Government's evidence established that, as of January 1947, the rate of pay of employees of petitioner corporation was raised from 85 cents to $1 per hour (R. 84, 88, 100, 116, 120, 124, 128, 129, 216-217) and that, at various times during 1948, the employees worked more than 40 hours per week without additional compensation for overtime (R. 84, 85, 88, 91, 92, 95, 97, 100, 109-111, 114-116, 121). In the case of

[1] The indictment contained 17 counts, of which counts 9 and 10 were dismissed (R. 6-14, 144, 255-256).

one employee paid at a fixed amount per month, petitioner's records failed to specify in any manner the hours worked (R. 138).

Petitioner Owens testified that the dollar per hour rate had been adopted to cover small periods of overtime (R. 164-166), but, according to the employees, they were not told that the 15-cent raise was for overtime until they were subpoenaed to testify before the grand jury (R. 88, 100, 116, 124, 128-129).

There was also testimony that in 1946, the Wage and Hour Division had investigated the Thlocco Oil Company, another corporation of which Owens was the head, and had discovered some violations for the period before June 1943 but not for the later period (R. 58-60, 69-71). At that time Owens had contended that any actual overtime that might have occurred for a brief interval in 1942 and 1943 was paid for by increased compensation (R. 62-67). Owens testified that he interpreted the failure of the Wage and Hour Division to take further action as clearance (R. 171).

The trial judge, in an extensive instruction to the jury (R. 242-252), dealt with the mental elements of the offenses as follows:

> [Violation of the Act] is made an offense only, in the words of the Statute, if the employer wilfully violates the terms of the Act. [R. 243.]

* * * * *

The word "wilfully" connotes an intentional violation of the law. And you are advised, gentlemen of the jury, that a defendant who actually does violate the provisions of the Fair Labor Standards Act would not be guilty of a criminal offense unless he is either conscious of the fact that what he is doing constitutes a violation of the Act or unless he wholly disregards the law and pursues a course without making any reasonable effort to determine whether the plan he is following would constitute a violation of the law or not. [R. 244.]

* * * * *

* * * [E]ven if you should determine that McGeath was working more than forty hours per week you should also return a verdict for the defendant if you find that there was not a wilful violation as I have heretofore defined that term. [R. 248.]

* * * The Act was violated but the burden rests upon the Government to prove beyond a reasonable doubt as I have heretofore stated that those violations were wilful and intentional, as I have defined those terms. [R. 248.]

* * * * *

* * * The only purpose for which the proof was permitted to go in with reference to the inspection of the Thlocco Oil Company and conversations that Carney had with the defendant Owens pertaining to the affairs of the Thlocco Oil Company is for the purpose of

shedding whatever light that evidence may shed upon the question of Mr. Owens' knowledge of what he could or could not do under the Fair Labor Standards Act, and therefore giving some indication of whether he wilfully and intentionally violated the Act as a result of the plan he adopted to compensate his employees or the employees of the Nabob Oil Company in 1947. [R. 249.]

* * * There has been evidence that has gone in tending to indicate that upon Mr. Owens' theory that he did not give his men a raise of pay from eighty-five cents an hour to a dollar an hour but simply adopted the method—a more simplified method of paying them overtime compensation [—] that they actually got more money in the new plan adopted, or as much money under the new plan adopted as they would have gotten under the old plan had they been paid time and a half for overtime as required by the Fair Labor Standards Act.

* * * [T]he question of whether the employees would get more or less money under one or another plan is unimportant in determining whether there has been a violation of the Act with respect to the payment of one and one-half times the regular rate of pay for work done in excess of forty hours. But the evidence was permitted to go to you gentlemen, and may properly be considered by you, in determining whether or not [petitioners] intentionally violated the Fair Labor Standards Act when they changed from the eighty-five

> cents an hour rate of pay to the dollar an hour rate of pay. [R. 250.]

At the close of the instruction, the trial judge asked counsel for petitioners whether they had any additional suggestions. The answer was in the negative (R. 251), but later, counsel for petitioners objected in the following terms (R. 252):

> The defendants now each separately and severally object to that portion of the Court's charge in which the Court defined the term wilful, wilfully, or wilfulness to the jury.

ARGUMENT

The instructions clearly charged the jury that, even though a person might do the acts which violate provisions of the Fair Labor Standards Act, he would not be guilty criminally "unless he is either conscious of the fact that what he is doing constitutes a violation of the Act or unless he wholly disregards the law and pursues a course without making any reasonable effort to determine whether the plan he is following would constitute a violation of the law or not" (*supra*, p. 5). Thus, petitioners received the benefit of instructions requiring that there be a conscious violation of the law or an equally culpable recklessness as to any attempt to comply—instructions far more favorable to petitioners than instructions requiring only intentional action. Although the Court of Appeals below concluded (R. 275-276) that intentional action would have been sufficient under

the Act,[2] the question is not presented by this case because the jury were actually instructed that they must find more than intentional action.

Petitioner's attempt to interpret the instructions as a directive that mere intent to do the acts would suffice (Pet. 11) relies unduly, in fact totally, upon the word "intentionally" in one particular portion of the extensive instructions, and ignores the several other portions in which wilfulness is specifically referred to and dealt with as something additional beyond intent (*supra*, pp. 4-6). It ignores, further, the general purport of the instructions,

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[2] We think the conclusion correct, under the authority of *Rosen* v. *United States*, 161 U. S. 29, 41; *United States* v. *Illinois Central R. R. Co.*, 303 U. S. 239, 242-243; *Browder* v. *United States*, 312 U. S. 335, 341-342; *Townsend* v. *United States*, 95 F. 2d 352, 358 (C.A.D.C.), certiorari denied, 303 U. S. 664; *Zimberg* v. *United States*, 142 F. 2d 132, 137-138 (C.A. 1), certiorari denied, 323 U. S. 712; *Fields* v. *United States*, 164 F. 2d 97, 100 (C.A.D.C.), certiorari denied, 332 U. S. 851.

The decisions of this Court cited by petitioners (Pet. 9), in which a bad purpose was deemed necessary are not apposite. The specific and precise requirements of the Fair Labor Standards Act for payment of time and one-half after 40 hours (29 U.S.C. 207, 215(a)(2)) and for maintenance of records of actual hours worked (29 U.S.C. 215(a)(5); 29 CFR 516), present no such vagueness as made necessary the decisions in *Screws* v. *United States*, 325 U. S. 91, and *United States* v. *Ragen*, 314 U. S. 513, to avoid unconstitutional lack of definition of the offense, nor do the requirements present such innately difficult determinations on the part of the accused as was the case in *United States* v. *Murdock*, 290 U. S. 389 (in which a decision of this Court was first necessary to clarify the limits of the privilege of self-incrimination), *Felton* v. *United States*, 96 U. S. 699 (in which complex structural aspects of distillery apparatus were involved), *Potter* v. *United States*, 155 U. S. 438, and *Spurr* v. *United States*, 174 U. S. 728 (in which complex accounting aspects of banking practice were involved, and there were even difficulties on the part of the accused in obtaining the necessary basic facts).

which, we submit, clearly charged the jury that there would be no criminal offense unless petitioners were consciously violating the Act or were reckless as to whether they were or were not complying (*supra*, pp. 4-7). The instructions, far from being insufficient as contended by petitioners, are more favorable to petitioners than was required by the Act.[3]

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[3] In addition the Court of Appeals below was correct in its position that petitioners failed to comply with Rule 30 of the Federal Rules of Criminal Procedure, in failing to specify the portion of the instructions deemed objectionable (R. 275). As noted, *supra*, p. 7, the trial judge, at the close of his instructions, asked for any additional suggestions, at which time a genuine misunderstanding, if any existed, could have been explored and, if need be, rectified. There was still time, later, for specific objection, but petitioners, instead, made only a general and indefinite objection to the definition of the word "willfully" (*supra*, p. 7). The circumstances do not present the unusual aspects of *Screws* v. *United States*, 325 U. S. 91, 107, cited by petitioners, but rather come within the normal rule under which this Court will not take notice of a merely general objection made in violation of Rule 30. *Palmer* v. *Hoffman*, 318 U. S. 109, 119; *Waters* v. *Kings County Trust Co.*, 144 F. 2d 680, 682 (C. A. 2), certiorari denied, 323 U. S. 769.

CONCLUSION

The judgment below is correct and no conflict of decisions or question of general importance is presented. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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